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No. 88-902 and 88-929

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, ET AL., PETITIONERS

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL, PETITIONERS

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency abused his discretion in determining, under Section 404(c) of the Clean Water Act, 33 U.S.C. 1344(c), that the development of a shopping mall in a 49.5-acre wetland in Attleboro, Massachusetts, would have an unacceptable adverse effect on wildlife.

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**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the court of appeals (88-902 Pet. App. 1a-29a) is reported at 850 F.2d 36.[1] The opinion of the district court (Pet. App. 32a-63a) is reported at 674 F. Supp. 405. The Final Determination of the Assistant Administrator (Pet. App. 64a-108a) is unreported.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 88-902.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on June 8, 1988. A petition for rehearing was denied on September 2, 1988 (Pet. App. 109a-110a). The petitions for a writ of certiorari were filed on December 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters" (Sec. 101, 33 U.S.C. 1251). Under Sections 301 and 502 of the Act, 33 U.S.C. 1311 and 1362, any discharge of dredged or fill materials into "navigable waters"—defined to include "waters of the United States"—is forbidden unless authorized by a permit issued by the Secretary of the Army, acting through the Corps of Engineers, pursuant to Section 404, 33 U.S.C. 1344 (1982 & Supp. IV 1986). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

In deciding whether to issue a permit under Section 404, the Corps is governed by guidelines developed jointly by the Secretary and by the Administrator of the Environmental Protection Agency (EPA). 33 U.S.C. 1344(b) (1982 & Supp. IV 1986). Those guidelines provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem" (40 C.F.R. 230.10(a)). The guidelines further specify that an alternative is "practicable" if "it is available and capable of being done, after taking into consideration cost, existing technology, and logistics in light of overall project purposes" (40 C.F.R. 230.10(a)(2)). Moreover, an

otherwise available alternative may be considered even if it is "not presently owned by the applicant," provided that such alternative can "reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity" (*ibid.*).

The guidelines also state two presumptions that govern the Corps' evaluation of practicable alternatives. First, where a proposed project will affect a "special aquatic site" (which is defined to include wetlands (see Pet. App. 36a)), but the project does not by its nature require access to such an aquatic site, the guidelines state that "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise" (40 C.F.R. 230.10(a)(3)). Second, where the project will affect a special aquatic site, "all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise" (*ibid.*).

Section 404(c), 33 U.S.C. 1344(c), authorizes the Administrator of the EPA to veto a permit that otherwise would be issued by the Corps, where the Administrator determines that the proposed discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." An "unacceptable adverse effect" is one that has an "impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas" (40 C.F.R. 231.2(e)). The Administrator must exercise that "veto" power in accordance with established procedures. See 40 C.F.R. Pt. 231.

2. a. The present case concerns petitioner Pyramid Companies' proposed construction of a shopping mall in certain wetlands, known as "Sweedens Swamp," located in Attleboro, Massachusetts. Sweedens Swamp is a 49.5-acre wetland, which is part of an 80-acre site near Interstate 95. It is undisputed that Pyramid's proposed shopping center would involve the discharge of dredged or fill materials into "waters of the United States," thereby requiring a permit under Section 404 of the Clean Water Act. Pet. App. 3a, 6a, 9a.

Some time prior to April 1982, Pyramid's predecessor, the Edward J. DeBartolo Corporation, purchased the swamp. At that time, there was a second, non-wetland site available, only three miles away in North Attleboro, Massachusetts, that could also have accommodated the proposed shopping mall. On July 1, 1983, however, the New England Development Company, a competitor of Pyramid, began to purchase options to buy the North Attleboro site. Thereafter, in December 1983, Pyramid purchased Sweedens Swamp from DeBartolo. Pet. App. 9a-11a, 40a.

In August 1984, Pyramid applied to the New England regional division of the Corps for a permit to discharge into Sweedens Swamp.[2] It sought to fill or alter 32 of the 49.5 acres of the swamp; to excavate nine acres of uplands in an attempt to create artificial wetlands; and to alter 13.3

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[2] Because Massachusetts requires state approval for projects that would fill wetlands, DeBartolo had previously applied to the Massachusetts Department of Environmental Quality Engineering (DEQE) for permission to build on Sweedens Swamp. DEQE initially denied the application. Thereafter, in March 1985, DEQE granted approval to Pyramid for the project, based on an application of regulations that were in effect when DeBartolo had applied. That determination was eventually upheld by the Massachusetts Supreme Judicial Court. Pet. App. 9a-10a.

acres of existing wetlands to improve its environmental quality. Some time later, Pyramid proposed to mitigate the adverse impact on the wetlands by attempting to create 36 acres of replacement wetlands in an off-site gravel pit. Pet. App. 11a.

In connection with its application for a permit, Pyramid submitted information concerning "practicable alternatives" to the Sweedens Swamp site, including the North Attleboro site. In rejecting the latter site as an alternative, Pyramid contended that it " 'lacked sufficient traffic volume and sufficient access from local roads' "; that " 'potential department store tenants had expressed strong doubts about the feasibility of the site' "; and that " 'previous attempts to develop the site had met with strong resistance from the surrounding community.' " Pet. App. 11a-12a (emphasis omitted).

On May 2, 1985, after receiving comments from EPA that were critical of the proposed construction, the Corps' regional division recommended to national headquarters that the permit to construct the mall be denied. General John F. Wall, the Director of Civil Works at the national headquarters, disagreed. He found that Pyramid's proposal to create an off-site artificial wetland sufficiently mitigated the adverse environmental effects of the project. He also determined that the North Attleboro site was unavailable as an alternative because it had been "optioned by another developer." On June 28, 1985, pursuant to Wall's directive, the Corps sent Pyramid a notice of its intent to grant the permit. Pet. App. 12a-13a.

b. EPA thereafter initiated a review of the Corps' decision under Section 404(c). On May 13, 1986, the agency determined that a permit should not be issued (Pet. App. 64a-108a). The agency first found that Sweedens Swamp "provides many wetland values such as wildlife habitat,

food chain production, natural flood storage, groundwater discharge, and water quality renovation" (*id.* at 76a). "Construction of a large shopping center at Sweedens Swamp," the agency explained, "would drastically change the hydrology, soils, and biology of the area" (*ibid.*). In particular, the agency found that the proposed project would eliminate or alter a substantial part of the wildlife habitat in the swamp, including "species of birds, small mammals, and amphibians, that are typical of New England forested swamps" (*id.* at 77a). The agency therefore concluded that the mall project "would have adverse impacts on wildlife values protected by section 404(c)" of the Clean Water Act (*id.* at 83a).

The agency next addressed the question whether the adverse effects of the mall project were "unacceptable," explaining that that question turned, in part, on whether there were less drastic alternatives available. The agency found that the North Attleboro site was a "practicable alternative" to Sweedens Swamp (Pet. App. 86a-105a). It determined that the North Attleboro site was feasible, noting that New England Development was pursuing a similar project on that site (*id.* at 88a). The agency also concluded that the North Attleboro site was "available." In reaching that conclusion, EPA examined the period during which the company was investigating the trade area and before it selected Sweedens Swamp (when it "entered the market" (Pet. App. 95a)), as well as the period between Pyramid's purchase of Sweedens Swamp in December 1983 and the submission of its permit application in July 1984. The agency observed that the guidelines under Section 404(b) "were intended to avoid unnecessary filling of wetlands and to require a prospective discharger to take a hard look *before* concluding that upland sites are not available" (*id.* at 92a (emphasis in the original)). Ac-

cordingly, the agency reasoned, "[i]t is both fair and consistent with the Guidelines to review the period of availability as including the period when the developer is selecting a site for its project" (*id.* at 93a). EPA found that the record clearly showed that "Pyramid and New England Development were exploring the same trade area at approximately the same time and that Pyramid decided against the North Attleboro site solely on the basis of unsuitability" (*id.* at 95a). The agency also explained that "[t]he uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints. Pyramid rejected the site not because it was unavailable but because Pyramid believed it was not an economically viable site." *Id.* at 94a. The agency concluded that Pyramid had not "met its burden of showing that the North Attleboro site was unavailable" (*id.* at 95a-96a).[3]

Finally, the agency concluded that "locating a shopping mall at the North Attleboro site would have less adverse impact on the aquatic ecosystem" (Pet. App. 98a). Among other things, the agency noted, "the North Attleboro site has less than one acre total wetlands, scattered in small pieces, compared to the 32 acres to be filled at Sweedens Swamp" (*ibid.*). The agency also rejected as insufficient Pyramid's proposal to mitigate the adverse impact of its project by creating a wetland complex out of a mostly

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[3] EPA also noted that since New England Development had not acquired all its options on the North Attleboro site until July 1984, the site may have remained available to Pyramid throughout that period. In addition, the agency found that because of "[t]he special circumstances of this case," any alternative that had been available to Pyramid's predecessor should likewise be regarded as an alternative available to Pyramid. Pet. App. 95a-97a.

upland gravel pit. It found that the proposal "presents substantial risks and uncertainties" (*id.* at 101a), and that "even if successful," the proposal "would not provide the same kind of habitat as that which would be lost at Sweedens Swamp" (*id.* at 103a-104a).

3. Petitioners thereafter brought an action in the United States District Court for the Northern District of New York, challenging EPA's decision as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 704, 706. On cross-motions for summary judgment, the district court ruled for respondents (Pet. App. 32a-63a). The court first found (*id.* at 47a-55a) that in deciding whether the proposed use of the wetlands would have an "unacceptable adverse effect," the agency was entitled "to take into account the existence of a 'practicable alternative' " (*id.* at 48a). Turning to the merits, the court upheld EPA's finding that the North Attleboro site constituted a practicable alternative to Sweedens Swamp. The court agreed that the North Attleboro site was both feasible (*id.* at 55a-57a) and available to Pyramid (*id.* at 57a-59a), and it rejected petitioners' contention that a site may be found to be "available" under 40 C.F.R. 230.10(a) only if it is available to the developer at the time that the agency acts on the developer's permit application. The court found, instead "that the record supports the EPA's finding that the North Attleboro site was available to Pyramid at the time it 'entered the market' in September or December of 1983" (*id.* at 60a).[4]

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[4] The district court also held that "[e]ven assuming that the EPA reached an arbitrary decision regarding the availability of a practicable alternative, its Final Determination must be upheld as reasonable because it was based upon a rational, independent finding that a significant loss in wildlife would result from the construction of a mall at Sweden's [*sic*] Swamp" (Pet. App. 61a).

4. The court of appeals affirmed by a divided vote (Pet. App. 1a-29a). The court first held that EPA's construction of the governing regulations—according to which the availability of the North Attleboro alternative should be judged as of the time that Pyramid entered the market for a construction site—was reasonable in these specific circumstances. The court explained that although the language of 40 C.F.R. 230.10(a)(2) is phrased in the present tense, " 'the regulations do not indicate *when* it is to be determined whether an alternative "is" available,' i.e., the 'present' of the regulations might be the time the application is submitted; the time it is reviewed; or any number of other times" (Pet. App. 16a (emphasis in the original)). Moreover, the court noted that the purpose of the regulations "is to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (*ibid.*); petitioners' reading of the regulations, the court stated, "would thwart this purpose because it would remove the incentive for a developer to search for an alternative site at the time such an incentive is needed, i.e., at the time it is making the decision to select a particular site" (*id.* at 16a-17a). "If the practicable alternatives analysis were applied to the time of the application for a permit," the court explained (*id.* at 17a), "the developer would have little incentive to search for alternatives, especially if it were confident that alternatives soon would disappear."[5]

Judge Pratt dissented (Pet. App. 25a-29a). In his view, the market entry analysis improperly "focus[es] on the decisionmaking techniques and tactics of a particular developer" (*id.* at 26a) and "inject[s] exquisite vagueness"

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[5] The court also held that EPA's "market entry" approach to the regulations was not in conflict with prior practice (Pet. App. 17a-19a), and that it was neither excessively vague nor unfair (*id.* at 22a-24a).

into the determination of whether a particular site is an "available" alternative (*id.* at 27a). Judge Pratt concluded that the availability of a site should instead be based on "the circumstances which exist at the time [EPA] makes its decision" (*id.* at 28a).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioners' challenge to the EPA's decision arises principally from the unusual facts of this case: that by the time Pyramid submitted its application for a permit, a competitor had begun purchasing options to an otherwise available upland site, thereby making it arguably unavailable to Pyramid. The agency's fact-bound determination, upheld by both the district court and the court of appeals, warrants no further review.

1. Petitioners first contend (88-902 Pet. 13-18) that the "market entry" formulation "provid[es] no guidance to the regulated community of the standard to which it will be held" (*id.* at 13), because EPA has "refused to specify the point in time at which the availability inquiry begins" (*id.* at 14). Petitioners assert that governmental planning agencies, in particular, "are always in the market" (*id.* at 15). In petitioners' view, the EPA's standard is imprecise and they contend that as a result "[l]ocal, state and regional planning efforts will be undermined" (*id.* at 17).

The question when, precisely, a developer is "in the market" for purposes of the "market entry" standard is simply not presented in this case. As the agency found—in a finding that petitioners do not dispute—"[t]he uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of

the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints" (Pet. App. 94a). Indeed, the agency noted (*ibid.* (citation omitted)), "Pyramid rejected the site not because it was unavailable but because Pyramid believed it was not an economically viable site. Pyramid stated that it would have turned down the site for its project even if it were offered 'for free.' " In short, Pyramid never considered the North Attleboro site at all, regardless of when Pyramid was in the market or the site was available. The EPA accordingly had no occasion in this case to resolve the precise moment at which a developer may be said to be "in the market," for purposes of determining the availability of competing alternatives.

2. Petitioners next contend (88-902 Pet. 18-25) that EPA's market entry standard is inconsistent with the purpose of Section 404 of the Clean Water Act, because it does not require "an objective inquiry into the impacts on the physical environment that would result from the choice of one site over another" (*id.* at 20). In petitioners' view, EPA's analysis "disregards the environmental impacts on the land in question" and thereby "fail[s] to protect the wetland" (*ibid.*).

As the court of appeals explained, however, EPA's application of the regulations in this case is entirely faithful to the purposes of the Clean Water Act. The Act is designed, in principal part, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251). By focusing on the period during which a developer is considering its options, and has not yet committed its resources to a particular wetland site, the market entry standard "create[s] an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (Pet. App. 16a). By con-

trast, "[i]f the practicable alternatives analysis were applied to the time of the application for a permit, the developer would have little incentive to search for alternatives, especially if it were confident that alternatives would soon disappear" (*id.* at 17a).

Petitioners assert (88-902 Pet. 20), however, that the market entry approach "leads inevitably to consideration of factors far different from those contemplated by Congress." For example, in this case, petitioners argue, the agency inappropriately requested records reflecting the developer's efforts to pursue upland alternatives. Petitioners apparently believe (see *id.* at 21, 23-24) that the EPA may evaluate only the environmental impact of a project, and may not consider whether there are alternatives available to the developer. There is no basis for that contention. Section 404(c) of the Act, 33 U.S.C. 1344(c), expressly requires the agency to determine whether the proposed project "will have an unacceptable adverse effect." As the district court observed (Pet. App. 48a), Section 404(c) does not preclude the EPA, in determining whether an "adverse effect" is "unacceptable," from considering whether less "adverse" alternatives were available. Indeed, the regulations promulgated under Section 404(c) state that the Administrator should consider the "relevant portion of the [404(b)] guidelines" in making his Section 404(c) unacceptability determination; the Section 404(b) guidelines expressly require a consideration of practicable alternatives. See 40 C.F.R. 231.2(e); Pet. App. 6a-7a & n.2, 48a.

3. Petitioners also contend, in passing (88-902 Pet. 25-27), that evaluating alternatives at the time of market entry is inconsistent with the language of the pertinent regulations. The court of appeals correctly rejected that claim. Although the regulations are phrased "in the pres-

ent tense" (88-902 Pet. 25), they do not specify the point in time at which an alternative must be "available" in order to constitute a "practicable alternative." The court of appeals was therefore correct in concluding that "when the agencies drafted the language in question they simply were not thinking of the specific issues raised by the instant case, in which an applicant had available alternatives at the time it was selecting its site but these alternatives had evaporated by the time it applied for a permit" (Pet. App. 16a). Because the text does not resolve the issue, the court correctly looked to the *purpose* of the regulations—"to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (*ibid.*)—and held that EPA's interpretation of the regulations comports with that governing purpose.

4. In the court of appeals, petitioners also contended that the analysis of alternatives at the time of market entry is inconsistent with the past regulatory practices of both the Corps and the EPA (Pet. App. 17a-19a). The Second Circuit rejected that contention, finding that the issue was one of first impression (*id.* at 19a). Petitioners do not renew that claim, apparently recognizing that there is no conflict among the lower courts over the market entry analysis. They assert, however, that the issue is sufficiently important to warrant this Court's review. But, as the Second Circuit observed, EPA had employed its Section 404(c) authority only five times since the enactment of that provision. During that same time, the Corps has processed an average of 11,000 permit applications annually. Pet. App. 9a.

Moreover, petitioners' present challenge to the market entry approach contradicts the position they took at an earlier stage in these proceedings. When petitioners submitted their supplemental permit application to the Corps in October 1984, they argued that the appropriate time for

assessing practicable alternatives was when the applicant was exercising its business judgment. Pet. App. 93a. As petitioners put it at the time, "To avoid this 'second guessing' of reasonable business judgments, the regulating agency's reference point must be the point in time when the proponent analyzed its alternatives." C.A. App. 372. That is the very time frame that the EPA analyzed, and that petitioners now repudiate.

5. Finally, petitioners contend (88-929 Pet. 6-12) that the EPA exceeded its statutory jurisdiction under Section 404(c) when, in making its decision, it considered the environmental consequences of the proposed shopping mall for other parts of Massachusetts, in addition to the impact on Sweedens Swamp. That claim is meritless. Section 404(c) authorizes the Administrator of EPA to prohibit a proposed discharge when he finds that it "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas" (33 U.S.C. 1344(c)). By its terms, Section 404(c) does not limit the regions that the Administrator may take into account in making his determination, and it certainly does not require him to consider only the effect on the particular wetland site. Indeed, because a significant change in the environmental quality of a particular wetland is likely to affect the quality of surrounding regions (see Pet. App. 77a, 79a), it would not be sensible to construe Section 404(c) as narrowly as petitioners propose.[6]

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[6] Petitioners base their contrary reading of Section 404(c) on the fact that the provision authorizes the Administrator to prohibit discharge into a "defined area' whenever he determines that the requested discharge into "such area" will have an unacceptable adverse effect (88-929 Pet. 7-8). The quoted language provides simply that the Administrator must determine whether to permit discharge into a

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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specific area; it does not provide that, in making that determination, he is forbidden to consider the environmental impact on surrounding areas.

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